No. 90-976

In The

Supreme Court of the United States

October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H. WELLBORN, JR., M.D.; ARTHUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN DE WETERING, M.D.; WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit deny the parties procedural due process when it denied the parties' right to brief the issue of the appropriateness of the order awarding minimal sanctions?

II. Did the United States Court of Appeals for the Eleventh Circuit err in its application of the standard of review of the order awarding minimal sanctions?

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The judgment of the Court of Appeals for the Eleventh Circuit was entered on July 30, 1990. (Appendix A, App. 1.)

JURISDICTION

This petition for a writ of certiorari was filed within 90 days of the July 30, 1990 judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. *See also Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986) (holding that request for fees under either Fed. R. App. P. 11 or 28 U.S.C. § 1927 requires the district court to make a determination which is collateral to the merits of a claim.)

STATEMENT OF THE CASE

In May 1983, twelve member/directors of Anclote Psychiatric Center, Inc. (APC), a not-for-profit corporation, organized Anclote Manor Hospital, Inc. (AMH), a for-profit corporation. AMH then purchased substantially all of APC's assets for $6.3 million. AMH resold those assets in October 1985, two and one half years later, for approximately $29 million.

In May 1986, Lawrence J. Lewis, M.D., a former APC employee, filed a complaint in the United States District Court for the Middle District of Florida against AMH, its

twelve shareholder/directors, and the directors' attorney (collectively, Anclote), alleging that the price paid by AMH was below the fair market value for the property and that Anclote was guilty of violating RICO, 18 U.S.C. § 1964(c), having effected the 1983 sale by virtue of a "breach of fiduciary duty."

Pursuant to their own Rule 11 obligations, Anclote's counsel pointed out, in at least two letters to Lewis' counsel, that Lewis had no standing to sue, and that he had no basis for his federal "racketeering" allegations against Anclote, which were the sole basis for federal jurisdiction in this otherwise nondiversity matter. Lewis, however, failed to respond and persisted in his efforts to prosecute. Anclote's motion to dismiss was denied and discovery ensued. Further, Lewis and his counsel fomented a series of newspaper articles regarding the AMH transactions, which resulted in adverse publicity, and caused incalculable damage to the Anclote defendants.

Not surprisingly, the Honorable George C. Carr granted Anclote's motion for summary judgment in July 1987, based upon Lewis' lack of standing, among other reasons. Lewis' appeal failed, as did his petition for a writ of certiorari. Anclote moved for sanctions on February 2, 1988.[1]

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[1] At that time, actual damages caused to the Anclote defendants by Lewis, including the cost of defending the suit (but omitting the attorneys' fees later incurred to prosecute the Rule 11 appeal), exceeded $300,000.

The Honorable William J. Castagna denied the motion on April 7, 1989,[2] without conducting a hearing or inquiring further into its justification. Anclote appealed to the Eleventh Circuit.

On February 8, 1990, the court found that "the cursory nature of the district court's order [made] it impossible . . . to engage in meaningful appellate review," vacated the decision, and remanded "for the limited purpose of allowing [the] court to clarify its reasons for refusing to impose Rule 11 sanctions."[3] On April 9, 1990, Judge Castagna vacated his previous order and recused himself, having entered the order appealed "inadvertently." The case was then transferred to the Honorable William Terrell Hodges.[4]

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[2] Judge Carr had become very ill in the interim.

[3] On February 19, 1990, Anclote filed a petition for rehearing of the order remanding the case, in part because Judge Carr, who had heard the underlying suit, had since died. Anclote sought clarification of the mechanics required to comply with the order, especially "whether an opportunity [would] be available for subsequent briefing to [the appellate court] following the anticipated order denying sanctions" by the district court. The petition was denied on April 16, 1990.

[4] Following the district court's action, on April 18, 1990, Anclote again sought direction from the appellate court, asking for clarification of both that court's order vacating the order appealed, and also instructions as to the appropriate procedure to follow, in light of the district court's order vacating the order appealed (which Anclote suggested the lower court had no jurisdiction to do). Anclote noted then that the order appealed from no longer existed. Nevertheless, on May 22, 1990, that motion was denied.

On April 23, 1990, Judge Hodges referred this matter to the U. S. Magistrate, directing her to give "fresh consideration" to the issues. Following an evidentiary hearing, Magistrate Jenkins filed her report and recommendation. Judge Hodges adopted her report in its entirety and ordered sanctions in the amount of $4,420. His order, her report, the hearing transcript, and the parties' objections were then forwarded to the appellate court.

On July 30, 1990, the Eleventh Circuit entered its judgment, noting that Judge Castagna's order denying sanctions, from which the appeal had been taken, had been vacated, and that Judge Hodges had entered an order granting sanctions. Conceding that, by doing so, it would circumvent the parties' right to brief the issues, the court nonetheless affirmed Judge Hodges' order:

> Mindful of the fact that the parties to this appeal have not had an opportunity to brief this court following the district court's order on limited remand, we have carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.
>
> . . . .
>
> For the foregoing reasons, the district court's order imposing sanctions against J. Miles Buchman [Lewis' counsel] in the amount of $4,420.00 . . . [is] AFFIRMED.

This judgment was followed on August 23, 1990 by a mandate issued by the Eleventh Circuit, which erroneously stated:

> ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that

> the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;
>
> IT IS FURTHER ORDERED THAT defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of the Court.

The order appealed had been vacated by both the appellate court and the lower court. The order affirmed was Judge Hodges' order awarding sanctions, which was not on appeal.[5]

REASONS FOR GRANTING WRIT

I. BY DENYING THE PARTIES' RIGHT TO BRIEF THE ISSUE OF THE PROPRIETY OF THE ORDER GRANTING SANCTIONS, THE APPELLATE COURT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND, FURTHER, SANCTIONED A SIMILAR DEPARTURE BY THE DISTRICT COURT, AS TO REQUIRE THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

No Federal Rule of Appellate Procedure addresses these procedural circumstances. However, Rule 4(a)(4) confronts a similar situation, the peculiar predicament that develops when a timely notice of appeal is followed by a timely motion:

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[5] That order is the subject of another appeal filed, in an abundance of caution, by Anclote, pursuant to Fed. R. App. P. 4, Case No. 90-3550 in the Eleventh Circuit Court of Appeals. Lewis moved to dismiss on the theory that Anclote is limited to its original appeal of Judge Castagna's order.

> (i) for judgment under Rule 50(b); (ii) under Rule 52(a) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

Rule 4 further provides that a notice of appeal filed before the disposition of such a motion is of "no effect," obviously because the original order has been replaced by the order on the subsequent motion. Consequently:

> A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

The new notice is mandatory.

The analogy to the instant procedural scenario cannot be disputed; the sole distinction is that the request for findings was made, not on motion of a party, but upon limited remand by the appellate court, after it had vacated the order appealed.

Rule 2 confers broad equitable discretion upon the court of appeals to suspend the requirements of any rule (except 26(b)) for good cause shown. That there is no rule overtly applicable to these circumstances and that such a decision would have caused no prejudice to Lewis is good cause alone to suspend that part of Rule 4 which distinguishes its application here.

Moreover, the spirit of Rule 4 should govern in any case, especially in light of the vacating of the order appealed by both trial and appellate courts. Accordingly,

because Anclote should have been entitled to appeal the order awarding minimal sanctions in a Rule 4 situation, and, therefore, to brief its position that the sanctions eventually awarded were inappropriate and insufficient, Anclote should have been afforded that due process opportunity here, as well.

The Eleventh Circuit judgment in this case raises important policy and procedural considerations. First, the appellate court remanded the matter to the trial court for the limited purpose of obtaining findings of fact to support the order appealed. But the court below vacated that order, and entered a wholly new order. This breach of proper procedure was ignored by the Eleventh Circuit and was, in effect, sanctioned by that court.

Second, the court limited its consideration of the parties' arguments regarding the propriety of the new order to the initial briefs, which addressed only the original denial of sanctions, and to the objections filed below, a plainly inequitable outcome. (If the resolution of this issue were that simple, it would follow that no briefs are needed on any appeal.)

Like the situation initially presented to this Court in *Rice v. Sioux City Memorial Park*, 349 U.S. 70 (1955), "despite the rather unique circumstances of this case," the Eleventh Circuit's willingness to deprive the parties of procedural due process renders this issue "special and important" enough to merit the consideration of the Court. (And, unlike *Rice*, in which the Court ultimately dismissed certiorari as improvidently granted, no remedy has been effectuated by the legislature.) This is especially

true in a situation involving a request for Rule 11 sanctions, in which the Court should intervene to communicate to both litigants and the courts that: 1) the issue of Rule 11 sanctions is not to be treated casually or in the cursory manner seemingly espoused by the Eleventh Circuit here; and 2) the arguments of the parties involved in the underlying action are entitled to due consideration and procedural due process by the appellate tribunal.

II. BECAUSE THE APPELLATE COURT DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS WHEN IT DENIED THE PARTIES' RIGHT TO BRIEF THE ISSUE OF THE PROPRIETY OF THE ORDER GRANTING SANCTIONS, THE COURT FURTHER ERRED IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE ORDER AWARDING MINIMAL SANCTIONS.

The Eleventh Circuit limited the parties' arguments before it (and thereby its review of the order awarding minimal sanctions), to the initial briefs, which addressed only a denial of sanctions, and the objections filed below.

Moreover, on its own, the court purported to employ the newly enunciated standard of review of Rule 11 sanction orders, that of abuse of discretion, announced by this Court after the lower court had entered its order awarding sanctions. *Cooter & Gell v. Hartmax Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990). But the court denied Anclote the opportunity to address the application of that standard to the circumstances at hand, despite the fact that, prior to *Cooter*, it had previously relied upon *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985), for the proposition that a *de novo* standard should be applied to the trial court's legal

rulings with respect to a motion for sanctions. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1986) (en banc). And Anclote had argued that the more easily satisfied *de novo* criterion required the reversal of the court below.

Thus, as a result of the appellate court's departure from accepted judicial procedure and its consequent denial of Anclote's due process right to brief the issues, the court was unaware that the application of the more stringent abuse of discretion standard nevertheless mandated reversal of the trial court's holdings with respect to the variety of Lewis' Rule 11 violations, as well as reversal of the amount of the sanction awarded for being "inappropriate" under Rule 11. Anclote was prohibited from demonstrating to the appellate court that the trial court had abused its discretion, relying on a "materially incorrect view of the relevant law" (the *Cooter* standard) in reaching its conclusions that:

1. Lewis' counsel had fulfilled his legal pre-filing duties;

2. neither Lewis nor his counsel had engaged in conduct that was unreasonable or vexatious;

3. there was no violation of the improper purpose element of Rule 11; and

4. sanctions should not have been imposed against Lewis himself. (His counsel alone was penalized).

Anclote was further prevented from showing the court that all of the foregoing had impacted to drastically lower

the trial court's assessment of what amount constituted a reasonable sanction.[6]

Furthermore, because the issue of the amount of sanctions was not addressed at all in the initial briefs, much less the standard to be applied to a review of an award, Anclote was prevented from demonstrating to the appellate court that the trial court had relied upon a clearly erroneous view of the law in setting the penalty at so low a figure as $4,420.

The far reaching significance of the Eleventh Circuit's denial of Anclote's due process right to brief the issues raised on appeal should not be ignored. Further, the need for the Court to address the issue of the amount of "appropriate" Rule 11 sanctions has been clarified by the perfunctory review afforded by the court of appeals. The ramifications of the judgment entered here "imply a reach to a problem beyond the academic or the episodic" (*Rice*, 349 U.S. 74) and "involve principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

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[6] The magistrate had premised her recommendations regarding the amount of sanctions on her holding that Lewis' lawyer had violated Rule 11 only by failing to satisfy his factual prefiling obligations.

CONCLUSION

The Eleventh Circuit's judgment denying the parties' right to brief their objections to the order granting sanctions, so far departed from the accepted and usual course of judicial proceedings, and, further, its sanction of a similar departure by the district court, requires the exercise of the Supreme Court's power of supervision.

For the foregoing reasons, Petitioners respectfully petition the Supreme Court to grant a writ of certiorari to review the judgment and opinion of the Eleventh Circuit.

DATED: October 29, 1990

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3382
Non-Argument Calendar

D.C. Docket No. 86-00654-Civ-T-13C

LAWRENCE J. LEWIS, M.D., a contributor
to Anclote Psychiatric Center, Inc.,
a Florida Not For Profit Corporation,

Plaintiff-Appellee,

versus

ANCLOTE MANOR HOSPITAL, INC.,
a Florida For Profit Corporation,
WALER H. WELLBORN, JR., M.D.,
ARTHUR R. LAUTZ, MANUEL VALLES, JR.,
ROBERT L. CROMWELL, THOMAS C.
FARRINGTON, JR., THOMAS E. MCLEAN,
JAMES C. TREZEVANT, JR., SERGE BONANNI,
LORRAINE HIBBS, ALBERT C. JASLOW, M.D.,
ROBERT J. VAN de WETERING, M.D.,
WALTER L. COOPER, JAMES P. O'DONNELL,

Defendants-Appellants,

ROBERT A. BUTTERWORTH,
Attorney General of the
State of Florida,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida.

(July 30, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

In May of 1989, the defendants appealed the district court's order of April 7, 1989 denying their motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and their motion to tax costs against the plaintiff.

On February 8, 1990 we issued an opinion remanding this case to the district court for the limited purpose of allowing that court to clarify its reasons for refusing to impose Rule 11 sanctions against the plaintiff. We reserved ruling on the defendants' appeal of the district court's refusal to tax costs. This case is before us following the district court's disposition on limited remand.

On remand, the district court vacated its initial order and referred the case to a United States Magistrate for a report and recommendation as to appropriate disposition of the matter. The district court, adopting and confirming the report of the magistrate, ordered that sanctions be imposed against J. Miles Buchman, counsel for plaintiff, in the amount of $4,420.00.

Under the recent Supreme Court case of *Cooter & Gell v. Hartmarx Corp.*, No. 89-275, 58 U.S.L.W. 4763 (June 11, 1990), the appellate court is to apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determination. We have reviewed the district court's order incorporating the report and recommendation of the magistrate and conclude that the district court did not abuse it discretion in awarding sanctions in the amount of $4,420.00.

Mindful of the fact that the parties to this appeal have not had an opportunity to brief this court following the district court's order on limited remand, we have carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.

We have also reviewed the district court's separate order denying the plaintiff's motion to quash the Clerk's taxing of costs and ordering that costs be taxed against the plaintiff in the amount of $5,816.40. We hold that the court did not abuse its discretion in allowing costs to the prevailing party pursuant to Fed. R. Civ. P. 54(d).

For the foregoing reasons, the district court's order imposing sanctions against J. Miles Buchman in the amount of $4,420.00 and its order denying the plaintiff's motion to quash the Clerk's taxing of costs are AFFIRMED.

No. 90-976

In The

Supreme Court of the United States

October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H. WELLBORN, JR., M.D.; ARTHUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN DE WETERING, M.D.; WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D., a contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,

Plaintiff,

Case No: 86-654-CIV-T-13C

vs.

ANCLOTE MANOR HOSPITAL, INC., a Florida For Profit Corporation, et al.,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE comes on for consideration[1] by the undersigned magistrate of Defendants' (Except Smith) Motion for Sanctions (Dkt. 122) following referral of by the district court for fresh consideration of the issues to determine whether sanctions and/or costs are appropriate and, if so, in what amount. An evidentiary hearing on defendants' motion was held before the undersigned on April 27 and 30, 1990.

Defendants, except Smith,[2] move for sanctions, including attorney fees, costs, and a fine against the

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[1] This matter has been referred to the undersigned by the district court for consideration and a Report and Recommendation. See Local Rules 6.01(b) and 6.01(c)(18), M.D. Fla.

[2] Except as otherwise noted, the term "defendants" when used in this Report and Recommendation shall refer to all

(Continued on following page)

plaintiff, Lawrence J. Lewis, M.D. and his attorney, on the grounds that Dr. Lewis and his attorney violated Rule 11, Fed.R.Civ.P. In addition, defendants seek extraordinary costs and fees from plaintiff's counsel under 28 U.S.C. § 1927 for multiplying the proceedings in the case as to increase costs unreasonably and vexatiously.

For the reasons stated hereafter, I find that plaintiff's counsel has violated Rule 11 by not conducting a reasonable pre-filing inquiry into certain material allegations of the complaint. I recommend that sanctions in the amount of $4,420.00 be assessed against counsel personally for the Rule 11 violation.

I. Introduction

The six-count complaint, based on federal question jurisdiction, contained claims against the defendants for common law fraud and breach of fiduciary duty (Counts One, Two and Three) and civil RICO claims (Counts Four and Five). In essence, the complaint charged that the directors of Anclote Psychiatric Center (APC), the directors' agent (Attorney O'Donnell) and Anclote Manor Hospital (AMH) sold APC's assets (a psychiatric hospital and other real property) at considerably less than fair market value to for-profit corporation AMH (controlled by the defendant directors) and then re-sold the assets for a huge profit less than 18 months later to American Medical International (AMI).

(Continued from previous page)

defendants named in the complaint except for Florida Attorney General Jim Smith.

Count Six of the complaint sought a writ of mandamus against Florida Attorney General Jim Smith due to the failure of the Florida Department of Legal Affairs after due notice to institute action against APC's directors for operating the public charity contrary to the terms of its charter, in violation of Florida Statutes, section 617.09.

The relief sought included treble damages, costs, attorney's fees, an accounting of the profits realized by defendants and injunctive relief.

The complaint stated that plaintiff, Lawrence J. Lewis, M.D. a contributor to APC, "is bringing this action on behalf of APC and has standing to do so." (Complaint at paragraph 9). It alleged that in addition to being a contributor, Dr. Lewis was APC's Medical Director and Director of Admissions.

II. Procedural Posture

The complaint was filed on May 30, 1986. On September 17, 1986, the district court denied defendants' motion to dismiss and for judgment on the pleadings which challenged *inter alia* plaintiff's lack of standing to bring the RICO action and the lack of a genuine issue of material fact as to the fraud allegations. After the parties had conducted discovery, the court, on July 7, 1987, granted summary judgment in favor of defendants, finding that plaintiff lacked standing to sue and without reaching the merits of the substantive claims.

On February 2, 1988, defendants filed the instant motion for sanctions which, by order of the district court

dated April 7, 1989, was denied.[3] In separate appeals, defendants appealed the denial of their motion for costs and plaintiff appealed the order granting summary judgment for defendants.

On January 5, 1988, the Eleventh Circuit Court of Appeals affirmed, *per curiam*, the order granting summary judgment in favor of defendants. The appellate court, in another *per curiam* opinion issued February 8, 1990 on defendants' appeal of the denial of sanctions, partially remanded the case for clarifications of the reasons for the district court's denial of defendants' motion for sanctions.

III. Issues Presented for Review

On April 24, 1990, the undersigned entered an order scheduling an evidentiary hearing to address the following issues:[4]

> 1. Whether plaintiff and his attorney made sufficient pre-filing inquiry into the facts so as to determine if the complaint was well-grounded in fact under Rule 11, Fed.R.Civ.P.;
>
> 2. Whether plaintiff's attorney made sufficient pre-filing inquiry into the law regarding standing to sue to determine whether the complaint as filed was warranted by existing law or a good faith argument for the extension, modification,

---

[3] In his order the Honorable William J. Castagna, district judge, also set aside an award of costs taxed by the clerk against plaintiff in the amount of $5,816.40.

[4] Counsel for plaintiff and defendants received actual notice of the hearing and obtained a copy of the order on the same date.

or reversal of existing law under Rule 11, Fed.R.Civ.P.;

3. Whether the complaint was interposed for an improper purpose under Rule 11, Fed.R.Civ.P.;

4. Whether plaintiff's attorney, by filing the complaint and proceeding with the prosecution of the case against defendant unreasonably and vexatiously multiplied the proceedings in the case under 28 U.S.C. § 1927 and the court's inherent power;

5. If sanctions are properly assessed against either plaintiff or his attorney, or both, what amount of fees and/or costs and/or expenses are defendants entitled to under either Rule 11, Fed.R.Civ.P. or 28 U.S.C. § 1927.

IV. Rule 11, Fed.R.Civ.P.

Under Rule 11, Fed.R.Civ.P., the signature of an attorney or party signing a pleading constitutes a certificate that:

> he has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

Rule 11, as amended, is judged by an objective standard of reasonableness under the circumstances viewed at the time at which the pleading was filed. *Threaf Properties Ltd. v. Title Ins. Co. of Minn.*, 875 F.2d 831, 835 (11th

Cir. 1989). Circumstances to be taken into account include:

> how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Ibid., quoting from Advisory Committee Note to Rule 11.

A. Did Plaintiff and Counsel Conduct Adequate Pre-Filing Inquiry into the Facts?

Rule 11 on its face requires counsel to make a reasonable inquiry to determine that the pleading, motion or other paper is well-grounded in fact. Defendants contend that plaintiff and his counsel did not conduct an adequate pre-filing inquiry into the factual allegations of standing, damages and the RICO claim in the complaint. The allegations which defendants focus on in particular are the following paragraphs:

> 8. Plaintiff, Lewis, has contributed both money and property to Public Charity, and has relied therefore on its exemption from taxation under Section 501(c)(3) of the Internal Revenue Code.
>
> 9. As a contributor, Medical Director, and Director of Admissions, Plaintiff, Lewis, is bringing this derivative action on behalf of Public Charity, and has standing to do so.
>
> . . .
>
> 16. Prior to May 1, 1983, [APC's] directors and O'Donnell as persons within the meaning of 18

> U.S.C. § 1961(3) met, and agreed to receive income derived, directly or indirectly, from a pattern of racketeering activity which was used to acquire an interest in [APC] by arranging for the sale of the assets of [APC], a corporation in which they were the sole members of the board of directors, to [AMH], a corporation in which they were the sole stockholders and directors.
>
> . . .
>
> 48. [APC's] directors, by using their fiduciary position as directors to obtain secret profits, [AMH] and O'Donnell have devised a scheme to defraud [APC], and said scheme was planned and agreed to by O'Donnell, and for the purpose of executing such scheme have placed in a depository for mail matter a thing to be sent by the Postal Service.
>
> . . .
>
> 56. Plaintiff was injured in its business and property by reason of these violations of 18 U.S.C. 1962, in that, as a direct and proximate result of the acts of Charity's Directors, For Profit Corporation, and O'Donnell, Public Charity suffered damages due to the loss of corporate opportunity in the sale of its assets to American Medical International. As such, Plaintiff is entitled to an accounting from Charity's Directors, For Profit Corporation and O'Donnell as to the distribution of the funds against the proceeds and property of the corporation, and to an award of damages for injuries sustained by Plaintiff as a result and consequence of Charity's Directors' breach of fiduciary duty.

1. What Dr. Lewis Knew

At the sanctions hearing, Dr. Lewis testified that he based his claims primarily upon his firsthand

observations and indirectly through conversations concerning the sale of APC to AMH and then AMI. (Tr. pp. 117, 147).[5]

Dr. Lewis testified that he first heard about the sale of APC to AMH for about $4.5 million from a conversation he had with Dr. Wellborn, the hospital's director, on May 10, 1983, one day after the sale. (Tr. pp. 121, 128, 159). He testified that he was concerned at the time of the sale's effects on his pension plan. (Tr. pp. 161-162).

Dr. Lewis testified that in his capacity as director of admissions he had been receiving monthly financial information concerning the hospital's operating margin and cash flow. (Tr. p. 156). This information indicated to him that the hospital was doing quite well and was, in fact, increasing its operating margin by $90,000 per month during the period October 1982 through March 1983. (Tr. pp. 157-158). At about that same time, Dr. Lewis learned that each of the directors had borrowed $40,000 for a down-payment and had taken a note secured by hospital property for the balance of the $4.5 million purchase price. (Tr. p. 160).[6] Dr. Lewis states that Dr. Wellborn told him not to tell anyone about the terms of the sale until the transaction was completed. (Tr. p. 161).

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[5] Excepts from the transcript of the hearing before the undersigned on sanctions held April 27, 1990 and April 30, 1990 shall be referred to as ("Tr. p. ___") (Volume I) and (Tr. 2 p. ___") (Volume II). The hearing exhibits shall be referred to as ("Pltf's Ex. ___") or ("Def's Ex. ___").

[6] The actual final price paid for APC's assets after taking into account the assumption of APC's liabilities, according to the testimony of Mr. O'Donnell, was 6.6 million. (Tr. p. 189).

Following the conversation with Dr. Wellborn, plaintiff become concerned about the hospital changing its status to a for-profit operation. (Tr. p. 162). Dr. Lewis then decided to speak with an attorney, Mr. Freeborn, at a Rotary Club meeting concerning the facts of the sale. (Tr. p. 162). Mr. Freeborn told plaintiff that the sale had to be arms-length and the price would have to be the fair market value and that he would have to see some documentation. (Tr. p. 162).

Plaintiff continued working at the hospital and sometime in September, 1983 decided to call a former justice of the Florida Supreme Court, attorney Arthur England. (Tr. pp. 129, 163-164). According to Dr. Lewis, Mr. England stated that he would look into the sale but that he needed to see a copy of the APC charter and IRS-related documents. (Tr. p. 164). Dr. Lewis related to England that he believed the sale of APC to the directors was in violation of the not-for-profit hospital's charter in that the hospital was being changed into a for-profit corporation and that the earnings of the hospital would go to the benefit of private individuals, the directors, rather than for charitable purposes. (Tr. p. 164). Mr. England told plaintiff that the case would be expensive to litigate and that it would be necessary to get expert witnesses. (Tr. p. 164). He also told plaintiff that the Florida Attorney General's office did not have the staff or the resources to follow through on a complaint unless they had documentation and advancement of funds. (Tr. p. 164).

Mr. England also told plaintiff that he would have to call Mr. Rosenkrantz, the attorney for APC who helped negotiate the sale on behalf of the seller, in order to find

out more about the sale. (Tr. pp. 148, 164). Plaintiff testified that he told Mr. England not to inquire into the facts of the sale with Mr. Rosenkrantz because he was afraid he would "lose his job" with the hospital. (Tr. pp. 148, 164).

It appears that plaintiff did not inquire of Dr. Wellborn into the bases for his suspicions concerning the sale nor did he inquire into the specifics of the sale's terms or APC's worth although Dr. Wellborn did tell plaintiff that there had been an appraisal. (Tr. pp. 141, 161-162).

Dr. Lewis also testified that he had several conversations with hospital personnel prior to filing suit which led him to believe that APC was sold for an inadequate price to the corporation controlled by the directors. (Tr. pp. 168-181). Dr. Randy Smith told plaintiff while the former was interviewing for a job that, one of the directors, Dr. Van de Wetering, said that the directors had bought the hospital in order to resell it for a profit. (Tr. p. 172).

Plaintiff testified that after putting together all of the financial information, the sales price information, his knowledge of the assets of APC, the statements of others concerning the value of APC and the motivations, of the directors, as well as a review of APC's charter,[7] he came to the conclusion that the directors sold APC's assets to themselves for less than fair market value in violation of

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[7] APC's Articles of Incorporation provide that the corporation is to be operated exclusively for scientific, educational and charitable purposes and that no part of its net earnings shall inure to the benefit of any private shareholder or individual. The board of directors constitute the membership of the corporation. (Pltf's Ex. 1).

the charter and resold them at a much higher price. (Tr. pp. 138-139; 174-175; 179). He stated that the directors were knowledgeable about the financial aspects of the hospital and had to know that the property was undervalued at the time of the May 1983 sale and that, therefore, they had committed fraud against APC and breached their fiduciary duties. (Tr. p. 179).

As for Mr. O'Donnell's role in the alleged fraudulent scheme, Dr. Lewis knew only that Mr. O'Donnell had represented APC in the 1983 sale and then represented AMH after the sale. He knew that Mr. O'Donnell had obtained some type of "hypothetical" private ruling letter from the IRS concerning the sale. However, he thought that Mr. O'Donnell had "represented both sides at one time or another". Although he learned that Mr. Rosenkrantz, another attorney, was brought in to represent APC in the negotiations, Dr. Lewis was not totally clear about the role which Mr. Rosenkrantz played in the transaction. (Tr. pp. 140-141; 146-147; 149-150).

Plaintiff admits that he never contacted Mr. Rosenkrantz and apparently never contacted Mr. O'Donnell. (Tr. pp. 140-141; 147, 153-154). However, given his position as an employee and his belief that the directors themselves were the wrongdoers, the undersigned concludes that it was not unreasonable for Dr. Lewis to refrain from further research prior to contacting counsel who then had the responsibility to research the law and conduct further research into the facts, if necessary, to determine if relief was appropriate. Defendants have made much of the fact that plaintiff waited until May 30, 1986 to bring suit. However, and sale to AMI did not take place until the fall of 1985, and it was not until then that

it was apparent that the hospital would be resold for substantially more than its 1983 purchase price, i.e. about $29.5 million. (Tr. p. 135-136).

2. Counsel's Inquiry into the Facts

Plaintiff's counsel was retained by plaintiff in February 1986. Prior to filing suit on May 30, 1986, and signing the complaint, plaintiff's counsel conducted only very limited factual inquiry into the circumstances outlined in the complaint.

Prior to filing suit, plaintiff's counsel did determine that Dr. Lewis had in fact made charitable contributions to APC in 1979. (Tr. p. 18). He knew that the IRS had not disallowed Lewis' deductions based on those contributions within the three-year statute of limitations set forth in 26 U.S.C. §6501(a) but as a tax attorney, counsel was aware, however, that there were exceptions to the three-year period. (Tr. p. 19).

At the hearing on sanctions, plaintiff's counsel testified that other than what his client told him,[8] his only pre-filing factual inquiry was a public records search of real estate filings concerning the two sales transactions in 1983 and 1985, counsel verified the tremendous difference

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[8] Plaintiff's counsel invoked the attorney-client privilege on numerous occasions during the sanctions hearing as to anything that he learned from his client. (*See e.g.* Tr. pp. 8-9, 22, 26, 30, 34, 43, 47, 62, 148). The applicability of the privilege in a Rule 11 hearing is a difficult issue. Although there was no testimony presented at the hearing that Dr. Lewis told counsel all that he knew, the undersigned will assume that to be the case.

in price by examining the documentary stamps. (Tr. pp. 23, 26). Plaintiff's counsel admits that he never requested to see the closing package of sale documents prior to filing suit, nor did he interview any of the individuals who furnished Dr. Lewis with information. (Tr. pp. 28, 32).

With regard to plaintiff's RICO claim, plaintiff's counsel simply assumed that the interstate wires and mails were used to effectuate a fraud because he learned from his client that one of the directors lived in Atlanta, Georgia. (Tr. pp. 63, 117). All of the documents pertaining to use of the mails and long distance telephone calls were obtained by plaintiff's counsel through discovery after the case was filed. (Tr. pp. 46-49, 63).

In particular, plaintiff's counsel did not take any steps whatsoever to determine the factual basis for certain RICO allegations. Yet the complaint alleges that Mr. O'Donnell along with the other defendants "agreed to receive income . . . from a pattern of racketeering activity . . . which was used to acquire an interest in [APC] by arranging for the sale of the assets of [APC] to [AMH]. (Complaint paragraph 16) and "devised a scheme to defraud [APC] . . . planned and agreed to by O'Donnell . . . and for the purpose of executing such scheme [used the mails]" (Complaint, paragraph 48). Counsel made no pre-filing inquiry to support these statements and others other than the public records search and what he learned from Dr. Lewis. (Tr. pp. 21-23; 26; 28; 33-34; 41-43; 62-63).

Similar allegations about Mr. O'Donnell's actions and those of the other defendants are contained in other paragraphs of the complaint: 49-51 (use of the wires and

mails in a scheme to defraud) and 52-55 (commission of acts constituting a pattern of racketeering activities).

Instead of carefully investigating his client's allegations, plaintiff's counsel merely assumed from the gross disparity in prices in the 1983 and 1985 sales and the terms of the APC charter that defendants had committed fraud and violated the RICO Act.

Some courts, after examining the particular circumstances involved, have found an inadequate pre-filing inquiry into the facts where counsel failed to contact pertinent witnesses or review all relevant documents in the client's possession or which otherwise are reasonably obtainable before filing suit. *See generally In re Ginther*, 791 F.2d 1151, 1155 (5th Cir. 1986); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986). A reasonable inquiry into fact ordinarily requires more than exclusive reliance on representations of fact made by the client. *See Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986).

One district court has articulated the standards for a factual inquiry as follows:

> . . . . A defendant must not be joined, or claim asserted against a defendant merely in the hope that discovery will turn up something against that defendant. The cost of determining whether a defendant should be named in the action must be borne by the plaintiff and his attorney before the suit is filed. The burden cannot be shifted to a defendant to prove himself out of the case after filing.
>
> . . .

> Before a defendant is named or a claim (such as a RICO claim) asserted against a defendant, the attorney's file should contain facts admissible in evidence, or at least facts indicating the probable existence of evidence, implicating that defendant or supporting that claim.
>
> . . .
>
> . . . [A]n attorney would be well advised to make as thorough an investigation as possible, perhaps even writing to the prospective defendants requesting access to their files, or asking for their side of the story. If the door is slammed in his face, he will have documented that he made what investigation he could.

(Footnotes omitted). *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206-207 (E.D. Ky. 1987).

In determining whether a reasonable inquiry into fact requires more than exclusive reliance on factual representations by the client, the court should consider such factors as: (1) the availability of alternative sources of information; (2) the character of the client's knowledge, including whether it is firsthand, derivative or hearsay in nature; (3) the plausibility of the client's account; (4) the history and duration of the relationship between the attorney and the client; (5) the extent to which the attorney questioned the client. *See* American Bar Association Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 115 (June, 1988) ("ABA Standards for Rule 11") (citations omitted).

Although plaintiff's counsel testified at the hearing that he filed the action on May 30, 1986 because he was concerned about a possible statute of limitations problem,

he had at least three months from when he was retained to discover such information or interview witnesses so as to test his client's information and theories. (Tr. p. 106). In the case at bar, when much of the client's information leading to his conclusions of wrongdoing were based on hearsay statements and "putting two and two together," counsel had an even greater duty to conduct further investigation before filing suit. There is no indication that plaintiff's counsel had previously represented Dr. Lewis. Plaintiff's counsel gave no testimony regarding how extensively he questioned his client as to the information furnished by him.

To determine the adequacy of pre-filing inquiry, this circuit has stated that it must "focus on what was reasonable for an attorney to believe at the time the pleadings were filed, not what the court later found to be the case." *Threaf Properties v. Title Ins. Co. of Minnesota*, 875 F.2d at 835.

In *Threaf*, the Eleventh Circuit reversed the district court's award of Rule 11 sanctions because it found that counsel had conducted an adequate pre-filing inquiry into the facts in a breach of contract case to certify that the complaint was well grounded in fact. In that case, the court cite the steps taken by plaintiff's first counsel which included the following: examination of the entire file, including deposition transcripts, from a prior quiet title action and a deposition in a prior criminal prosecution. Substitute counsel in the case filed a second amended complaint after reviewing the pleadings up to that point, speaking with prior counsel, reviewing documents from the criminal prosecution, and contacting another attorney

who had represented the plaintiff in the underlying real estate transaction. *Id.* at 835-837.

In contrast to the inquiry performed by counsel in *Threaf*, plaintiff's counsel in the case at bar did not review any documents other than public records which reflected the disparity of the purchase price, he did not interview witnesses or the attorneys involved in the 1983 or 1985 sales. There is no indication that he spoke with Mr. England, whom his client had initially consulted. In short, plaintiff's counsel in this case relied almost exclusively on the factual representations of his client in a case which he conceded was factually complex. (Tr. p. 56). More investigation was required under the circumstances.

The only allegations of damages in the complaint was that APC suffered a "loss of corporate opportunity" in the sale of its assets to AMI (Complaint, paragraph 56). Counsel could certify his good faith belief that there was an adequate factual basis for the damages claim because of evidence derived from counsel's public records inspection and information furnished by his client. The complaint did not allege that Dr. Lewis himself had incurred damages.

Based on information available when the complaint was filed, counsel could also properly certify his good faith belief that the allegations concerning the status of Dr. Lewis as Medical Director and Director of Admissions were also well-grounded in fact as was the allegation that plaintiff had contributed money and property to APC.

However, the preponderance of evidence indicates that plaintiff's counsel did not conduct sufficient prefiling inquiry into the facts to certify his good faith belief

that the RICO claim, the only basis for federal jurisdiction, was well grounded in fact particularly as to the allegations in the paragraphs previously discussed. Given the importance of these allegations to plaintiff's RICO claim, the only basis of federal jurisdiction, and counsel's failure to conduct a reasonable pre-filing investigation, a violation of Rule 11 has been established. *Compare Forrest Creek Associates, Ltd. v. McLean Sav. & Loan Ass'n*, 831 F. 2d 1238, 1244-1245 (4th Cir. 1987) (Rule 11 not violated where counsel conducted a reasonable pre-filing investigation and isolated factual errors in RICO claim made in good faith.)

B. Did Counsel Conduct a Sufficient Pre-Filing Inquiry into the Law of Standing?

Rule 11 requires a sufficient pre-filing inquiry into the law to determine whether the complaint, as filed, was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. However, Rule 11 was not intended to "chill innovative theories and vigorous advocacy that bring about vital and positive changes in the law. . . . It does not mean the end of doctrinal development, novel legal arguments or cases of first impression." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987). But if litigants "attempt to pursue civil litigation with legal theories apparently foreclosed by statute and precedent, they must do so with candor toward the court and with a sense of whether their argument is appropriate and reasonable." *United States v. Milam*, 855 F.2d 739, 745 (11th Cir. 1988).

Plaintiff's counsel testified at the hearing that he spent approximately sixty hours researching and preparing plaintiff's complaint. (Tr. pp. 102). Plaintiff's counsel estimated that from fifteen to twenty-five percent of the sixty hours was spent on the standing issue. (Tr. p. 105).

Plaintiff's counsel admitted during his testimony at the sanctions hearing that he found no case in his pre-filing research which supported the position that a contributor to a charity or an employee thereof had standing to bring a derivative suit on behalf of the charity. (Tr. p. 100). He researched case law on standing including (*Flast v. Cohen*, 392 U.S. 102 (1968), which was cited in plaintiff's Memorandum in Support of Sufficiency of Complaint (Dkt. 11), and also found a dissenting opinion in the case of *Sierra Club v. Morton*, 405 U.S. 727, 741-752 (1972) (Douglas, J. dissenting) which supported the general proposition that standing should be liberalized and that it should not be an impediment to reaching the merits of the case. (Tr. pp. 102-103). Counsel's only prior exposure to the law relating to RICO was in conducting research for this case and a seminar he attended on the subject. (Tr. p. 104). Thus he was presumably aware that a civil action for damages under the federal RICO Act may be brought only by a person "injured in his business or property by reason of a violation [of] the Act." 18 U.S.C. § 1964(c).

Plaintiff's counsel took the position throughout the case that public policy and common sense supported the theory of standing advanced in the complaint. It could be discerned from counsel's arguments in his memoranda in support of the complaint and in opposition to the summary judgment motion that he was presenting plaintiff's

standing argument as a new theory, and counsel explicitly argued that Rule 23.1, Fed.R.Civ.P. dealing with shareholder derivative actions did not apply to this case.

It does not appear to the undersigned that counsel has ever attempted to mislead or deceive the court or opposing counsel during the course of this litigation concerning plaintiff's theory of standing.[9] Counsel has consistently characterized plaintiff's suit as a derivative suit brought on behalf of APC, using analogies in the law. He has raised public policy and equity arguments that a contributor should have standing to sue on behalf of a non-profit corporation for alleged wrongs of its directors on the theory that the directors would have no incentive to bring suit on behalf of the corporation. *Compare Milam, supra* at 745 (Rule 11 violated where counsel made no arguments based on public policy, analogy or equity); *DeSisto College, Inc. v. Line*, 888 F. 2d 755, 766 (11th Cir. 1989) (Rule 11 violated where counsel's position on law indicated either insufficient research which would have led to discovery of adverse binding precedent or bad faith in failing to disclose those authorities).

Accordingly, the undersigned concludes that although defendants' motion for summary judgment was granted on the grounds that plaintiff lacked standing, sanctions are not warranted on the basis of any insufficient pre-filing inquiry regarding basis in law to bring suit. *See O'Neal v. DeKalb County, Ga.*, 850 F.2d 653, 658

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[9] Memorandum in Support of Sufficiency of Complaint (Dkt. 11, pp. 4-5; Response to Defendant Directors' Motion for Summary Judgment (Dkt. 101, pp. 2-3).

(11th Cir. 1988) (action not frivolous merely because summary judgment granted). Further, it does not appear that plaintiff's counsel advanced a position regarding standing to sue which was intended to mislead or deceive the court.

C. Was Suit Filed for an Improper Purpose?

An attorney or party may be sanctioned under Rule 11 for filing a pleading for an improper purpose, such as to harass the opposing party. *See Milam, supra* at 742.

In the hearing on sanctions, plaintiff that he felt a responsibility to uncover apparent wrongdoing concerning actions which he felt were contrary to the charitable purposes of the hospital, and did not want to be personally associated with such activities. He stated that he filed the lawsuit under the belief that he should "confront wrong in the community," and that this belief was a motivating factor in his decision to finally file suit to correct the wrong. Dr. Lewis also stated that he came to the conclusion in February, 1986 that no one else would be able to correct the wrong that he perceived and he "came to the realization that he had to do something."

There is no suggestion in the record before the undersigned that plaintiff or his counsel filed this suit in bad faith or for the purposes of harassing defendants or forcing defendants to offer him a quick cash settlement out of the alleged profits the directors made on the sale of the hospital.[10] Nor does the preponderance of evidence

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[10] There is conflicting testimony as to whether Dr. Lewis told Dr. Wellborn that he was angry because he had not been

(Continued on following page)

establish that plaintiff filed this suit only to obtain discovery for use by the Florida Attorney General in a subsequent state court action brought to enforce the terms of APC's charter.[11]

Whether a signator of a pleading or a party acted with an improper purpose in filing suit is judged under an objective standard. *See Milam, supra* at 743; *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987). Harassment, within Rule 11, is not determined by the effect of the challenged conduct on the opposing party – whether, for example, the conduct did in fact bother, annoy or vex. The focus is on the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986).

After considering the record and the testimony at the hearing on sanctions, the undersigned cannot conclude

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(Continued from previous page)

included in the APC/AMH sale. (Tr. 181-182; 199). Dr. Lewis denies making any such statement and the undersigned finds his testimony more credible than that of Dr. Wellborn on this issue.

[11] On May 9, 1989, the Honorable J.C. Cheatwood, circuit judge, found that the defendant directors improperly used APC in violation of its charter and had purchased APC assets at less than fair market price. The court found, however, that no remedy other than dissolution of the corporation was authorized by state law. The case is on appeal. (Pltf's Ex. 2). It appears that the Florida legislature is considering an amendment to Florida Statutes Section 617.09 to permit the Department of Legal Affairs to recover profits improperly received in light of Judge Cheatwood's opinion. (Pltf's Ex. 3; Tr. 2 pp. 5).

that plaintiff or his counsel filed this action for an improper purpose. Therefore, sanctions are not warranted under the improper purpose element of Rule 11.

V. 28 U.S.C. § 1927 and Court's Inherent Power

Defendants also seek sanctions against plaintiff's counsel for excessive costs, fees, and expenses under 28 U.S.C. § 1927, pursuant to which:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (as amended 1980).

The court also has the inherent power to assess attorneys' fees in certain cases of particularly egregious conduct on the part of attorneys practicing before it. *See Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980).

Sanctions under § 1927 or the court's inherent power are reserved for more egregious instances of bad faith conduct on the part of counsel. *See e.g. Pfister v. Delta Air Lines, Inc.*, 496 F. Supp. 932, 936-939 (N.D. Ga. 1980) (court noted that conduct of counsel in filing numerous unwarranted, bad faith, and scurrilous pleadings was "the most outrageous and unprofessional conduct on the part of an attorney that this Court has ever encountered").

The conduct of plaintiff's counsel in this case, apart from the Rule 11 pre-filing inquiry issue, was not unreasonable or vexatious so as to warrant sanctions under § 1927 or pursuant to *Roadway Express.*

VI. Type and Amount of Sanctions

Having determined that Rule 11 has been violated by plaintiff's counsel for failure to conduct an adequate pre-filing investigation into certain aspects of the complaint, a sanction is mandatory.

In the case at bar, defendant seeks the award of attorney's fees and costs, broken down as follows:

1. $157,630.02 in attorney's fees incurred by John Bush;

2. $8,223.50 in paralegal fees assisting John Bush;

3. $49,381.28 in costs incurred by Mr. Bush;

4. $80,896.72 in attorney's fees incurred by Edward Booth hired by defendants as criminal law counsel;

5. $18,877.86 in costs incurred by Mr. Booth;

6. $125,508.09 in attorney's fees claimed by defendant, James D. O'Donnell, Esq.;

7. $27,858.50 in costs incurred by Mr. O'Donnell;

8. $5,000.00 representing the amount of the deductible paid by Mr. O'Donnell to his malpractice insurance carrier following the company's review of the papers filed in this case.[12]

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[12] The legal fees and costs for Mr. Bush and his paralegal include time spent at the appellate level as well as the proceedings in the district court. (Def's Ex. 11, Tr. p. 2).

Plaintiff objects to the amount of fees claimed by defendants and to specific items included as costs as well as the propriety of defendant O'Donnell receiving fees and costs associated with this action and the necessity of the assistance of Edward Booth.

In determining the amount of sanctions which a court may impose within its discretion for violation of Rule 11, courts have set forth a number of factors to aid such a determination. Among the factors considered are: the good faith or bad faith of the offender, the degree of willfulness in the offense, the knowledge and experience of the offender, the ability of the offender to pay any award, the nature and extent of the prejudice on the offended party, and the relative magnitude of the sanction in light of the goals of the sanction. *See e.g. Eastway Const. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); *Matter of Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986); *see generally ABA Standards, supra*, at 125-126.

Commentators have stated that in assessing a sanction under Rule 11, the court should impose the least severe sanction adequate to serve the purposes underlying Rule 11 which it seeks to implement. *ABA Standards, supra*, at 124.

In this particular case, the undersigned has determined that plaintiff's counsel has not acted in bad faith or manufactured evidence, but merely relied unreasonably solely upon the information provided by his client as to some of the RICO allegations of the complaint. The undersigned has no knowledge of prior sanctionable conduct on the part of plaintiff's counsel and, throughout the

case, plaintiff's counsel's conduct before the undersigned has been appropriate.[13] No information was introduced at the hearing as to plaintiff's counsel's ability to pay a monetary sanction.

On the other hand, a mere reprimand would be too mild, given the magnitude of the allegations brought against defendants, the size of the fees and costs incurred in defending the case and the extensive publicity which resulted. (Def's Ex. 7).

In light of the foregoing analysis, the undersigned concludes that under the circumstances the imposition of sanctions against plaintiff's counsel in the total amount of the attorney's fees billed by defendants' counsel to his clients would be too harsh. Nor does the undersigned find that the conduct on the part of plaintiff's counsel, given the totality of the circumstances, justify requiring counsel to pay even a significant part of such total fees, given that the mere finding of a Rule 11 violation by counsel is a penalty in and of itself.

Instead, I find that the proper remedy for the sanctionable conduct by plaintiff's counsel would be to require counsel to compensate defendants for the fees associated with the preparation of defendants' motion for sanctions filed in the district court and for the services rendered by defendants' counsel, Mr. Bush, in arguing the motion for sanctions at the hearing before the undersigned held on April 27, 1990 and April 30, 1990.

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[13] A number of discovery motions were filed in the case and ruled on by the undersigned magistrate. Two hearings were also held.

After reviewing counsel's affidavit in support of his fees request and the billing records admitted as an exhibit at the hearing, the undersigned concludes that the amount of $4,420.00[14] is an appropriate amount of monetary sanctions to require plaintiff's counsel to pay to defendants, *pro rata*.

Because of the undersigned's finding that the plaintiff did not violate Rule 11, the undersigned concludes that plaintiff's counsel alone should pay this amount.

It is, therefore, respectfully recommended,

(1) that Defendants' (Except Smith) Motion for Sanctions (Dkt. 122) be GRANTED in part, in accordance with the foregoing.

Respectfully submitted,

/s/ Elizabeth A. Jenkins
ELIZABETH A. JENKINS
United States Magistrate

Dated: May 3rd, 1990.

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[14] Approximately seven hours were spent by counsel in presenting the motion for sanctions before the undersigned at the hearing held on April 27, 1990 and April 30, 1990. Mr. Bush presently bills his clients at a rate of $200.00 per hour according to his affidavit. Therefore, it appears that $1,400.00 would adequately compensate defendants for payment of fees to Mr. Bush for his services associated with the sanctions hearing. The remainder of the fees awarded, $3,020.00, the undersigned finds to be the reasonable amount of fees, based on submissions provided by Mr. Bush, for services rendered by Mr. Bush to defendants in connection with preparing the motion for sanctions.

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of its receipt shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

(3)

No. 90-976

In The

Supreme Court of the United States

October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H. WELLBORN, JR., M.D.; ARTHUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN DE WETERING, M.D.; WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Eleventh Circuit

SECOND SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D., a contributor to ANCLOTE PSYCHIATRIC CENTER, INC., a Florida Not For Profit Corporation,

Plaintiff,

vs.

Case No. 86-654-Civ-T-13(C)

ANCLOTE MANOR HOSPITAL, INC., etc., et al.,

Defendants.

_____/

ORDER
(Filed July 7, 1987)

This cause comes before the Court upon the defendants' (except Jim Smith, who was Florida's Attorney General at the time this action was filed, hereinafter "Smith") motion for summary judgment. In the motion, the defendants (except Smith) contend that there is no genuine issue of material fact as to the plaintiff's allegations of fraud and that the plaintiff lacks standing to sue. As the Court finds that the plaintiff does not have standing, this case is DISMISSED on jurisdictional grounds without a determination on the merits of the substantive claims asserted in the complaint.

In essence, the complaint alleges that the defendants (except Smith), as directors and attorney for Anclote Psychiatric Center, Inc. ("APC"), illegally converted APC's not-for-profit status to a for-profit corporation and otherwise breached their fiduciary duty and committed fraud

upon APC by selling APC's assets at less than fair market value to Anclote Manor Hospital, Inc. ("AMH"), which was controlled by the defendants, and then reselling the assets for a huge profit to American Medical International, in violation of APC's charter and 18 U.S.C. §1961, *et seq.* ("RICO"), as well as pendent state laws. The complaint states that plaintiff Lawrence J. Lewis "is bringing this derivative action on behalf of [APC], and has standing to do so." (Complaint at 9). Lewis maintains that he is not pursuing this action in his own right but is acting as a representative of APC. He bases his standing upon his charitable contributions to APC and upon his employment as a medical director and director of admissions of APC. (Memorandum in support of complaint at 3). The complaint also contains allegations against Florida's Attorney General (Smith) and states that Lewis tendered the requisite §100 fee to the Florida Department of Legal Affairs but Smith failed to institute any action against the defendants (except Smith) as required by Florida Statutes section 617.09.

The contributions upon which Lewis bases his standing were made in 1979 and consisted of $100 in cash plus an automobile for which he paid $200. The IRS has not disallowed Lewis' charitable deductions based upon those contributions within the three year statute of limitations set forth in 26 U.S.C. §6501(a), and Lewis has otherwise been unable to calculate any damages that he has personally suffered from the actions of APC's board of directors. In other words, the plaintiff has failed to show a "personal stake" in this action. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968) (focus on person who's standing is

challenged, not whether issue is justiciable).[1] *See also* 18 U.S.C. §1964(c) (limits civil RICO action to person "*injured in his business or property*" (emphasis added)).

Lewis further asserts that his position as a medical director and director of admissions of APC gives him a special interest in this case. However, Lewis was only an employee of APC and has never been on the board of directors or a member of APC, nor has he ever owned stock in APC. *See Fla. Stat.*, §617.50(5) (definition of "member"); *cf. Fla. Stat.* §617.022 (ultra vires – actions by members or directors); *see also Fla. Stat.* §617.011 (corporations for profit shall not issue stock). Both Federal and Florida law require that a plaintiff in a derivative action either be a shareholder or member of the corporation at the time of the transaction of which he complains or that such share or membership thereafter be devolved upon him by operation of law. *See* Fed.R.Civ.P. 23.1; *Fla. Stat.* §607.147. The plaintiff argues that such requirements are inapplicable to him because they are "merely rule[s] of procedure in 'membership' and 'shareholder' derivative actions, which this case is not." (Plaintiff's memorandum in support of complaint at 4 n.3). As noted, however, paragraph nine (9) of the complaint states that Lewis "is bringing this derivative action on behalf of [APC]. . . ."

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[1] Although the plaintiff relies on *Gray v. St. Matthews Cathedral*, 544 S.W. 2d 488 (Tex. Civ. App. 1976), in support of standing, the plaintiff in *Gray* had a definite "personal stake" in the outcome because he was a former member of the vestry who remained contingently liable for church debts and who was a successor trustee of the trust involved. No such personal stake is involved in the case at bar and *Gray* is otherwise inapposite.

Lewis' inability to bring an action under the rules for derivative actions reaffirms this Court's earlier determination – the plaintiff has no personal stake in the outcome of this action.

The plaintiff argues that to deny him standing "would create the absurd result . . . that there would be no legal mechanism to bring a representative suit on behalf of the Charity [and that] [a]s a matter of public policy, some individual plaintiff must have the right to protect the interests of a charity if those legally charged to do so fall short of their responsibilities." However, a mechanism for such relief has been provided by Florida law. *See Fla. Stat.* §617.09; *see also* 9 Fla. Jur. 2d *Charities* §18 (Attorney General is proper party and private parties generally have no right to maintain suit other than as relators to Attorney General). In addition, given the Attorney General's response to the defendants' (except Smith) motion for summary judgment, the plaintiff's concerns that the interests of the charity will not be protected are unfounded. Therein, the Attorney General asserts that he is still investigating and evaluating the evidence and is authorized under both common-law and statutory law to investigate, and if necessary, litigate the alegations contained in the complaint.

Accordingly, this action is DISMISSED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 7th day of July, 1987.

/s/ George C. Carr
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D., a contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,

Plaintiff,

v.

ANCLOTE MANOR HOSPITAL, INC., a Florida For Profit Corporation, et al.,

Defendants.

Case No. 86-654-CIV-T-13(C)

ORDER
(Filed April 7, 1989)

86-654

On July 7, 1987, this Court entered summary judgment against the plaintiff finding that he lacked standing to bring this action and dismissed the case. The Court's judgment was subsequently affirmed on appeal. Upon remand, all of the defendants (except defendant Smith) moved for Rule 11 sanctions and to tax costs. The defendants seek an award of attorney's fees and costs incurred in defending this case. On May 28, 1988, the clerk of the court assessed costs totalling $5,816.40 against the plaintiff. The plaintiff then moved to quash the clerk's taxing of these costs.

Rule 11, Fed.R.Civ.P., provides:

> The signature of an attorney or party constitutes a certificate by the signor that the signor has

> read the pleading, motion, or other paper; that to the best of the signor's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee.

The standard for testing an attorney's or party's conduct under Rule 11 is "reasonableness under the circumstances," an objective standard. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987). The defendants argue that the plaintiff's suit was meritless and vexatious and therefore Rule 11 sanctions are appropriate. Upon review of the file, the Court finds that the conduct of the plaintiff and his counsel was not of such an egregious nature that Rule 11 sanctions are warranted. Additionally, the Court finds that the defendants are not entitled to an award of costs in this case. It is well within the Court's discretion to disallow or reduce the costs allowed to a prevailing party, especially when the parties are unevenly matched in size and resources and where the losing party conducted the litigation in good faith. *See American Key Corp. v. Cumberland Associates*, 102 F.R.D. 496, 498 (N.D.Ga. 1984). In the case at bar, the parties are unevenly matched in size and resources and the plaintiff did not act in bad

faith in pursuing his claims. Also, many of the costs for which the defendants seek reimbursement were not necessary for preparing or presenting the standing issue to the Court. Under the circumstances of this case, the Court finds that the parties should bear there own costs.

Accordingly, the defendants' motions for Rule 11 sanctions and to tax costs are DENIED, and the plaintiff's motion to quash the clerk's taxing of costs is GRANTED.[1]

DONE AND ORDERED in Chambers in Tampa, Florida this 7th day of April, 1989.

/s/ William J. Castagna
UNITED STATES
DISTRICT JUDGE

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[1] The defendants also filed a motion to consolidate their motions for Rule 11 sanctions and to tax costs. Given the Court's disposition of these motions, the motion to consolidate is moot and therefore DENIED.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3382
Non-Argument Calendar

D.C. Docket No. 86-00654-Civ-T-13C

LAWRENCE J. LEWIS, M.D., a contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,

Plaintiff-Appellee,

versus

ANCLOTE MANOR HOSPITAL, INC., a Florida For Profit Corporation, WALTER H. WELLBORN, JR., M.D., ARTHUR R. LAUTZ; MANUEL VALLES, JR., ROBERT L. CROMWELL, THOMAS C. FARRINGTON, JR., THOMAS E. MCLEAN, JAMES C. TREZEVANT, JR., SERGE BONANNI, LORRAINE HIBBS, ALBERT C. JASLOW, M.D., ROBERT J. VAN de WETERING, M.D., WALTER L. COOPER and JAMES P. O'DONNELL,

Defendants-Appellants,

ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida.

(February 8, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's denial of defendant-appellants' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and of their motion to tax costs against the plaintiff-appellee.

The district court held that the conduct of the plaintiff and his counsel in the underlying litigation was "not of such an egregious nature" as to warrant Rule 11 sanctions. The court further granted the plaintiff's motion to quash the clerk's taxing of costs,[1] finding that such was not warranted where the parties were unevenly matched in size and resources and the plaintiff did not act in bad faith in pursuing his claims.

Defendants assert that the district court abused its discretion by relying on an incorrect standard when deciding the Rule 11 motion. They further claim that a *de novo* review of the legal arguments presented by the plaintiff in the underlying litigation will demonstrate that the suit was without basis in law. Finally, they state that the court abused its discretion in denying their motion to tax costs. Because we find that the cursory nature of the district court's order makes it impossible for this court to engage in meaningful appellate review, we vacate and remand.

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[1] The clerk of the court had assessed costs totaling $5,816.40 against the plaintiff.

The litigation on which the defendants' motion for sanctions and costs is based involved a suit by Lawrence J. Lewis, M.D., former Medical Director and Director of Admissions of Anclote Manor Hospital ("AMH") against AMH, the directors of the Anclote Psychiatric Center, Inc. ("APC"), the directors' attorney, and the former Florida Attorney General, Jim Smith. Lewis alleged that the defendants, except Smith, as directors and attorney for APC, illegally converted APC's not-for-profit status to a for-profit corporation. Lewis claims that in the process, the defendants breached their fiduciary duty and committed fraud upon APC by selling its assets at less than fair market value to AMH, which was controlled by the defendants, and then reselling the assets for a huge profit to American Medical International, in violation of APC's charter and in violation of RICO, 18 U.S.C. § 1961 et seq. Lewis based his standing to bring a derivative action on behalf of APC on the grounds that he had made charitable contributions to APC and had been an APC employee.

Upon defendants' motion for summary judgment, the district court dismissed the case on jurisdictional grounds, finding that Lewis lacked standing to bring a derivative action. The court stated that "[b]oth Federal and Florida law require that a plaintiff in a derivative action either be a shareholder or a member of the corporation at the time of the transaction of which he complains or that such share or membership thereafter be devolved upon him by operation of law." *Lawrence J. Lewis, M.D. v. Anclote Manor Hospital, Inc., etc., et al.*, No. 86-654-Civ-T-13(C), *aff'd* 837 F.2d 1093 (11th Cir. 1988) (per curiam), *cert. denied*, 109 S.Ct. 79 (1988). The court

explicitly stated that its order did not constitute a determination on the merits of the substantive claims asserted in the complaint.

I.

Rule 11, Fed.R.Civ.P. provides in part that:

> The signature of an attorney or party constitutes a certificate by the signor that the signor has read the pleading, motion, or other paper; that to the best of the signor's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

The language of the rule makes clear that if the court determines that papers were filed in violation of the rule, then the court *shall* impose an appropriate sanction. The Advisory Committee Note to Rule 11 states that the Rule's current language is "intended to reduce the reluctance of courts to impose sanctions." *See also, Collins v. Walden*, 834 F.2d 961, 964 (11th Cir. 1987).

Following the lead of the D.C. Circuit in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174-75 (D.C.Cir. 1985), the Eleventh Circuit, in *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987), adopted a dual standard of review

for evaluating district court orders relating to Rule 11 sanctions.[2] In *Thomas v. Evans*, 880 F.2d 1235, 1239 (11th Cir. 1989), the court set out the *Donaldson* standard of review as follows:

> An attorney or a party may be sanctioned under Rule 11 for filing a pleading that: (1) has no reasonable legal basis; (2) has no factual basis; or (3) is filed for an improper purpose. . . . Regarding the scope of appellate review of a Rule 11 sanction, factual determinations and the decision to impose sanctions are within the discretion of the district court and are subject to review only for abuse of discretion. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987). Determining whether a pleading or motion is legally sufficient, on the other hand, involves a question of law subject to de novo review. *Id.*

(citation omitted); *see also, DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989). In *Donaldson*, the Eleventh Circuit stated that the "reasonableness" of an attorney's behavior is an objective standard of "reasonableness under the circumstances." 819 F.2d at 1556. *See also Corp of the Presiding Bishop v. Assoc. Contractors*, 877 F.2d 938, 941 (11th Cir. 1989). The Advisory Committee Note to Rule 11, on which the *Donaldson* court relied, makes clear that

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[2] In *Donaldson*, the court stated:

> Whether (1) factual or (2) dilatory or bad faith reasons exist to impose Rule 11 sanctions is for the district court to decide subject to review for abuse of discretion; on the other hand, a decision whether a pleading or motion is legally sufficient involves a question of law subject to *de novo* review by this court.

819 F.2d at 1556.

"reasonableness under the circumstances" applies to counsel's pre-filing inquiry into the facts as well as his inquiry into the law on which he intends to base his argument.

In *Norton Tire Co., Inc. v. Tire Kingdom Co., Inc.*, we noted the *Donaldson* standard "evinces a clear policy to leave resolution of Rule 11 matters primarily in the hands of the trial judge, who by virtue of his close contact with the parties is best able to determine the propriety of sanctions." 858 F.2d 1533, 1536 (11th Cir. 1988). Thus, a district court judge's overall decision on whether to impose sanctions is reviewable under an abuse of discretion standard. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1422 (11th Cir. 1989) (employing abuse of discretion standard in upholding court's denial of appellants' motion for Rule 11 sanctions). *De novo* review only comes into play when this court is called upon to review the district court's findings as to the legal sufficiency of a pleading or motion.

II.

A. Factual Sufficiency

In their brief before this court, defendants recount, at length, statements of fact in the various papers filed by plaintiff's lawyer that it contends are false as well as legal arguments proffered by plaintiff that it considers to be without merit.[3] Rule 11, however, does not require

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[3] Defendants point to allegations and arguments in plaintiff's Complaint, Memorandum of Law in Support of Sufficiency of Complaint, Motion to Strike Defendants' Claims for

(Continued on following page)

imposition of sanctions merely because one party alleges as "facts" statements that the other party alleges (and may ultimately prove) are without basis. If this were so, imposition of sanctions on losing parties would be commonplace.

Instead, sanctions are to be imposed if the alleged facts and legal arguments are without merit *and* such facts and arguments were contrary to "the signer's knowledge, information, and belief formed after reasonable inquiry." Rule 11, Fed.R.Civ.P. *See Thomas*, 880 F.2d at 1240. (Rule 11 sanctions not appropriate merely because the pleader's view of the law is incorrect).

The district court's findings as to the factual basis of the complaint are reviewable for abuse of discretion. In the instant case, however, we find it impossible to exercise our review function because the district court has made no findings as to whether the complaint was grounded in fact. Further, while the district court recognized that such findings are to be made using an objective standard of "reasonableness under the circumstances," it went on to note that plaintiff and counsel's conduct was not "egregious." This suggests that the district court, despite its awareness of the correct standard, may have improperly relied on a subjective determination of counsel's conduct in refusing to award sanctions.

(Continued from previous page)

Attorney's Fees, and Motion to Add Party Plaintiff and Motion for Disqualification.

Defendants request this court to reverse the district court and order it to impose sanctions forthwith. This we decline to do. Because the district court has made no factual findings and because it is unclear whether the judge relied on the proper standard in reviewing the reasonableness of counsel's conduct, we feel that the prudent course of action is to remand this case to the district court. This will allow that court to clarify its reasons for refusing to award sanctions on the basis of factual insufficiency.

B. Legal Sufficiency

The district court did not make a finding as to the legal sufficiency of the arguments presented in the plaintiff's pleadings and motions. Defendants allege that had plaintiff's counsel conducted any inquiry into the law, he would have realized, among other things, that his client, being neither a shareholder or member of APC, had no standing to sue derivatively, and further would have realized that in order to maintain a suit under RICO, standing to sue derivatively is not enough; instead plaintiff must show that he was injured in his business or property.

The legal sufficiency of the arguments presented by the plaintiff is subject to *de novo* review. We find, however, that *de novo* review of the legal arguments necessarily includes factual findings as to the events that form the basis of the underlying litigation. Thus, we are loath to engage in review of the legal arguments before the district court has had an opportunity to make findings of

fact on the events that allegedly gave rise to plaintiff's legal claims.

Further, in *United States v. Milam*, 855 F.2d 739 (11th Cir. 1988), the Eleventh Circuit stated that "when parties attempt to pursue civil litigation with legal theories apparently foreclosed by statute and precedent, they must do so with candor toward the court and with a sense of whether their argument is appropriate and reasonable." *Id.* at 745. While plaintiff's reliance on his status as an employee or contributor to maintain standing is certainly a novel approach to a derivative action, the district court has made no finding as to whether this position was intended to deceive or mislead the court. We note that the mere fact that the district court refused to accept those theories and dismissed for lack of standing does not mean that sanctions are in order. *See O'Neal v. DeKalb County, Ga.*, 850 F.2d 653, 658 (11th Cir. 1988) ("Simply because the district court granted the defendants' motion for summary judgment does not mean that the plaintiffs' action was frivolous.").

We reserve ruling on the defendants' appeal of the district court's refusal to tax costs until we revisit this case after remand. Accordingly, we remand for the limited purpose of allowing the district court, within 60 days, to clarify its reasons for refusing to impose Rule 11 sanctions against the plaintiff.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D., a contributor to ANCLOTE PSYCHIATRIC CENTER, INC., a Florida not for profit corporation,

Plaintiff,

v.

Case No. 86-654-CIV-T-13C

ANCLOTE MANOR HOSPITAL, INC., etc., et al.,

Defendants.

NOTICE OF DELAYED DOCKETING
AND ORDER OF RECUSAL

On February 8, 1990, the Court of Appeals for the Eleventh Circuit issued its order remanding this case for the entry of findings of fact. That order and the case file were then forwarded to the Clerk of this Court. The order and file were misplaced in the Clerk's office. Upon discovery of the misplaced items, they were filed and docketed. As a result, this Court received the Court of Appeals' order of remand on this date, i.e. the date on which response was due.

Upon review of the matter, it further appears that the order of April 7, 1989 (D-138) was signed by this Court inadvertently; that there existed at that time and there continues to exist valid reason for this Court to recuse itself from any participation in this case. It is therefore ORDERED:

1. That the order of this Court of April 7, 1989 is vacated and withdrawn.

2. That I do recuse myself from participation in this cause.

3. That this cause be reassigned by the Clerk pursuant to the standing order on random assignment of cases.

DONE AND ORDERED at Tampa, Florida this 9th day of April, 1990.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES
DISTRICT JUDGE

Copies to
Counsel of Record
Clerk, U.S.C.A.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D.,

Plaintiff,

v.

ANCLOTE MANOR HOSPITAL, et al.,

Defendants.

Case. No. 86-654-Civ-T-13(C)

ORDER

The above-styled case is before the Court on limited remand from the United States Court of Appeals for the Eleventh Circuit. In an Order dated April 7, 1989, the Hon. William J. Castagna denied the defendants' motions for Rule 11 sanctions and to tax costs. The case subsequently was remanded to the District Court for the purpose of clarifying its reasons for refusing to impose Rule 11 sanctions against the plaintiff. Following remand, the Hon. William J. Castagna entered an Order of recusal and vacated the Order denying sanctions and costs. The case is now before the undersigned, who has assumed responsibility for all further proceedings. In light of the time period specified for resolution of this matter by the Eleventh Circuit[1] and given the fact that the undersigned is engaged in a protracted criminal trial, this case is referred to the United States Magistrate for her report and recommendation as to appropriate disposition of the matter.

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[1] The Eleventh Circuit's Order of April 10, 1990 directs the District Court to resolve this matter on or before May 9, 1990.

The Magistrate is directed to give fresh consideration to the issues to determine whether sanctions and/or costs are appropriate and, if so, in what amount.

DONE AND ORDERED in Chambers, in Tampa, Florida this 23rd day of April, 1990.

/s/ W. Darrell Hodges
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 89-3382
Non-Argument Calendar

D.C. Docket No. 86-00654-Civ-T-13C

LAWRENCE J. LEWIS, M.D., a contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,

Plaintiff-Appellee,

versus

ANCLOTE MANOR HOSPITAL, INC., a Florida For Profit Corporation, WALTER H. WELLBORN, JR., M.D., ARTHUR R. LAUTZ, MANUEL VALLES, JR., ROBERT L. CROMWELL, THOMAS C. FARRINGTON, JR., THOMAS E. MCLEAN, JAMES C. TREZEVANT, JR., SERGE BONANNI, LORRAINE HIBBS, ALBERT C. JASLOW, M.D., ROBERT J. VAN de WETERING, M.D., WALTER L. COOPER, JAMES P. O'DONNELL,

Defendants-Appellants,

ROBERT A BUTTERWORTH, Attorney General of the State of Florida,

Defendant.

Appeal from the United States District Court for the Middle District of Florida

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Before FAY, KRAVITCH and COX, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 30, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: AUG 23 1990

(4)

No. 90-976

In The

Supreme Court of the United States

October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H. WELLBORN, JR., M.D.; ARHTUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN DE WETERING, M.D.; WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

J. MILES BUCHMAN, Esq.
Buchman & Buchman
Attorneys at Law, P.A.
Post Office Box 454
Tampa, Florida 33601

Counsel of Record
for the Respondent

QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit deny the parties procedural due process when it denied the parties' right to brief the issue of the appropriateness of the order awarding minimal sanctions?

II. Did the United States Court of Appeals for the Eleventh Circuit err in its application of the standard of review of the order awarding minimal sanctions?

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STATEMENT OF THE CASE

Respondent, Lawrence J. Lewis, M.D. ("Lewis"), adopts the Statement of the Case of Petitioners, with the following corrections:

1. In his statement of the case, counsel for Petitioners misleads the Court by failing to disclose that Lewis' claim was based upon his status as a contributor to Anclote Psychiatric Center, Inc. (APC), the corporation which Lewis alleged that Petitioners' defrauded, which is a 26 U.S.C. Section 501(c)(3) Public Charity, and not his status as a "former APC employee." By inartfully describing Lewis solely as a "former APC employee", even though he knew that Lewis' "standing" was based upon his status as a contributor to APC, counsel for Petitioners has mischaracterized Lewis' role as Plaintiff.

It should be noted that the U.S. Magistrate, in her Report and Recommendation dated May 3, 1990, at page 20 (reproduced in the Supplemental Appendix to Petition for Writ of Certiorari, hereinafter "Supplemental Appendix"), specifically held that "[i]t does not appear to the undersigned that counsel has ever attempted to mislead or deceive the court or opposing counsel during the course of this litigation concerning plaintiff's

theory of standing." Following a two-day evidentiary hearing held April 27 and 30, 1990, the U.S. Magistrate determined that:

> [A]lthough defendant's motion for summary judgment was granted on the grounds that plaintiff lacked standing, sanctions are not warranted on the basis of any insufficient pre-filing inquiry regarding basis in law to bring suit. Further, it does not appear that plaintiff's counsel advanced a position regarding standing to sue which was intended to mislead or deceive the court. [Citations Omitted] (*See* Supplemental Appendix 20-21.)

2. There is no evidence in the record that "Lewis and his counsel fomented a series of newspaper articles regarding the AMH transactions..." In fact, the Magistrate specifically determined that "[t]here is no suggestion in the record before the undersigned that plaintiff or his counsel filed this suit in bad faith or for purposes of harassing defendants or forcing defendants to offer him a quick cash settlement..." *See* Supplemental Appendix, at 21. The Magistrate then concluded that neither Lewis nor his counsel filed the action for an improper purpose, and thus sanctions were not warranted under the improper purpose element of Rule 11. *See* Supplemental Appendix, at 22-23.

REASONS FOR DENYING THE WRIT

I

THE APPELLATE COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

There can be no question that the Appellate Court did *not* depart from the accepted usual course of judicial proceedings. Petitioners *claim* that the Appellate Court denied the parties the right to brief the issue of the propriety of the District Court Order granting sanctions, since it was issued after the parties' briefs on appeal were filed. As demonstrated below, this claim has no merit.

The Federal Rules of Appellate Procedure, which were complied with scrupulously by the Eleventh Circuit in this case, deal specifically with the circumstances herein which "authorities come to the attention of the party after the party's brief has been filed." Fed. R. App. P. Rule 28(j) specifically provides:

> (j) **Citation of Supplemental Authorities.**
>
> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after

> oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Thus, it was Petitioner's burden to "promptly advise" the Eleventh Circuit of any authorities that they desired to raise after the filing of their brief. And, Petitioners in fact availed themselves of that opportunity in this case on at least two separate occasions (by letters dated June 1, 1990 and June 12, 1990), both of which are part of the record in this case. Accordingly, there is no basis to consider that the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings by failing to allow Petitioners to file additional briefs, since Petitioners availed themselves of Rule 28, which specifically provides a procedure by which the parties can advise the court of authorities that come to their attention after their briefs have been filed.

Moreover, to the extent that Petitioners desired to address the issue raised by the Magistrate's Report and Recommendation, which was considered by both the

District Court and Eleventh Circuit in reaching their decisions, each of the parties filed lengthy and detailed objections to the Magistrate's Report and Recommendations.

As the record clearly reflects, after the filing of the initial set of briefs, the United States Magistrate conducted an evidentiary hearing on the question of sanctions on April 27 and 30, 1990. The exhaustive Report and Recommendation prepared by the Magistrate, which is reprinted in the Supplemental Appendix to Petition for Writ of Certiorari, consists of some 28 pages. The Magistrate specifically concluded that (1) Lewis' counsel had fulfilled his legal pre-filing duties, (2) neither Lewis nor his counsel had engaged in conduct that was unreasonable or vexatious, (3) there was no violation of the improper purpose element of Rule 11, and (4) sanctions should not be imposed against Dr. Lewis himself. The Magistrate merely found that the Plaintiff's lawyer had violated Rule 11 *only* by failing to satisfy his factual pre-filing inquiries, in that he "relied unreasonably solely upon the information provided by his client as to some of the RICO allegations of the complaint." *See* Supplemental Appendix, at 25. The Court concluded that the amount of $4,420.00 was an appropriate amount of monetary sanction

to require Plaintiff's counsel to pay. *But see Beeman v. Fiester,* 852 F.2d 206, 208, 210, 211 (7th Cir.1988) (suggesting that the Magistrate was incorrect in determining that Plaintiff's counsel failed to satisfy his factual pre-filing duties in this complex RICO case.)

Upon the issuance of its Report and Recommendation, the Magistrate authorized submission of written objections. Both parties elected to file such objections, which specifically addressed each element of the Magistrate's decision. Further, as set forth below, both the District Court, and Appellate Courts specifically acknowledged that they considered the parties' objections filed in response to the Magistrate's Report and Recommendation in reaching their decisions.

By order dated May 22, 1990, the Honorable William Terrell Hodges, stated:

> Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of the entire file, *including the objections of the parties to the report and recommendation,* the Magistrate's report is adopted and confirmed and made part hereof.

(The District Court Order of May 22, 1990, which is apparently missing from the appendices of the Petition, is reproduced in the appendix to this response.) The Eleventh Circuit then ruled on July 30, 1990 (which Order is reproduced in Appendix A in the Petition for Writ of Certiorari) that it "*carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.* [Emphasis supplied.]" Thus, both the District Court and Eleventh Circuit specifically acknowledged that they considered the parties' objections filed in response to the Magistrate's Report and Recommendation in reading their decisions.

In support of their claim that the Appellate Court far departed from the accepted course of judicial proceedings, the only legal authority Petitioners cite is this Court's decision in *Rice v. Sioux City Memorial Park,* 349 U.S. 70 (1955). (Petitioners also argue based upon Federal Rule of Appellate Procedure 4(a)(4), which by their own admission is inapplicable to this situation, and thus not controlling.) Not only, however, is the *Rice* case clearly is opposite to this case, but the Court's decision in the *Rice* case suggests that certiorari in this case should be *denied.*

In *Rice*, plaintiff had brought an action for damages for breach of a contract which contained a covenant that was restrictive on the grounds of race. The Iowa trial court held that the clause was not void, but was unenforceable as a violation of the Constitution and public policy of Iowa and the United States. It further held that "'the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action' contrary to the fifth and fourteenth Amendments." 349 U.S. at 72. When the Supreme Court of Iowa affirmed, plaintiff petitioned before this Court for certiorari, relying on the Fourteenth Amendment through the Due Process and Equal Protection clauses. This Court granted certiorari, "according to our practice, because at least four members of the Court deemed that despite the rather unique circumstances of this case Iowa's willingness to enforce this restrictive covenant rendered it 'special and important'." 349 U.S. at 74. The Supreme Court affirmed the decision of the Iowa Supreme Court.

The Petitioner in *Rice* then filed for rehearing before the Supreme Court, directing this Court's attention to an Iowa statute, enacted during the pendency of the litigation, but before reaching this

Court on Petitioners' application for certiorari. (The statute in question in *Rice* barred the ultimate question presented from arising again in the state of Iowa.) This Court granted the petition to rehearing, noting that the Statute was "not seen in proper focus because blanketed by the issues of 'state action' and constitutional power." 349 U.S. at 73.

In reviewing the criteria by which it determines whether a particular case meets consideration, this Court determined that it had "improvidently granted" certiorari.

> But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. [Citations omitted.]

349 U.S. at 74. The Supreme Court held further that: "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first

instance." 349 U.S. at 76. The Supreme Court vacated its order affirming the Iowa Supreme court, and dismissed the writ of certiorari.

This brief discussion of the *Rice* case demonstrates clearly that Petitioners' reliance on it is entirely misplaced. Unlike the *Rice* case, there is obviously no constitutional basis for granting certiorari in this case, whether on the basis of the Fourteenth Amendment, due process, equal protection, or any other constitutional right. Moreover, the Supreme Court in *Rice* makes clear that certiorari was granted only because some members of the Court deemed that Iowa's willingness to enforce a racially restrictive covenant rendered the case "special and important". Petitioners can point to no such special and important reasons in this case, whether on constitutional grounds or otherwise, to justify granting certiorari.

We respectfully submit that, Petitioners herein had ample opportunity to set forth their legal authorities without the need for any additional briefing before the Eleventh Circuit. The United States District Judge and Eleventh Circuit both specifically considered not only the transcript of the two-day evidentiary hearing before the United States Magistrate, but also the

objections to the Magistrate's Report and Recommendation filed by both parties, in affirming the Magistrate's conclusions. Further, Petitioners availed themselves of the procedure set forth in the Federal Rules of Appellate Procedures in making additional arguments to the Eleventh Circuit after filing their brief. Accordingly, the Eleventh Circuit did not depart from the accepted and usual course of judicial proceedings, having considered not only Petitioner's Supplemental Authorities, but also the objections filed by the parties to the Magistrate's Report and Recommendation.

II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT ERR IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE ORDER.

The Supreme Court in *Cooter & Gell v. Hartmarx Corp.*,___U.S.___, 110 S.Ct. 2447 (1990), recently set out *an abuse of discretion standard* for review of lower court orders awarding Rule 11 sanctions. This standard is, of course, applicable to the Eleventh Circuit in this case.

The Eleventh Circuit had *ample* opportunity, based on the record in this case, to determine whether the District Court had abused its discretion in affirming the Report and Recommendation issued by the United States Magistrate after a two-day evidentiary hearing and after considering objections filed by both parties. The Rules of Appellate Procedure did not require, nor did the Eleventh Circuit deem it necessary or appropriate, to require yet another set of briefs to be submitted to it to assist in its determination of the correct view of the law, which briefs would in all likelihood recite the arguments presented in the parties' Objections filed to the Magistrate's Report and Recommendation and Supplemental Authorities.

Moreover, the Eleventh Circuit specifically discussed the abuse of discretion standard of review under *Cooter & Gell v. Hartmarx Corp.*, and held:

> We have reviewed the district court's order incorporating the report and recommendations of the magistrate and conclude that *the district court did not abuse its discretion* in awarding sanctions in the amount of $4,420.00. [Emphasis supplied.]

See Eleventh Circuit order dated July 30, 1990 (which is reproduced in Appendix A in the Petition for Writ of Certiorari).

Petitioners maintain that they never had the opportunity to argue the application of the abuse of discretion standard as contained in the *Cooter & Gell v. Hartmarx Corp.* case to the circumstances of this case. This argument is meritless. In an attempt to argue the merits of the application of the abuse of discretion standard, Petitioners submitted by letter pursuant to Fed. R. App. P. 28(j) (Supplemental Authorities), dated June 12, 1990, to the Clerk of the United States Circuit Court of Appeals for the Eleventh Circuit a copy of the *Cooter & Gell v. Hartmarx Corp.* case, and their analysis of that case as it applies to the instant case. Indeed, Petitioners specifically argued to the Eleventh Circuit in their letter:

> While we cannot suggest that Cooter addresses the question whether the trial court's sanctions award or penalty is adequate or sufficient in terms of the amount (because the Court does not address that issue), it does appear that this court should address the question whether the trial court abused its discretion in the areas which we delineated in **DEFENDANTS' OBJECTION TO THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS,** which has been forwarded to you.

Thus, Petitioner's analysis of the application of the abuse of discretion standard to the circumstances of

this case is part of the record in this case, and was considered by the Eleventh Circuit prior to it rendering its Order dated July 30, 1990, which Order is the basis for Petitioners' application for a Writ of Certiorari.

Thus, it is clear that the United States Court of Appeals for the Eleventh Circuit did not err in its application of the standard of review of the Order.

CONCLUSION

As a practical matter, the Eleventh Circuit specifically considered the parties' objections to the order granting sanctions, and thus did not depart from the accepted and usual course of judicial proceedings.

Accordingly, for the foregoing reasons, Respondent Lawrence J. Lewis, respectfully requests that the Petition for Writ of Certiorari filed by Petitioners be denied.

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAWRENCE J. LEWIS, M.D.,
Plaintiff,

v .

Case No.86-654-Civ-T-13(C)

ANCLOTE MANOR HOSPITAL, INC., et al.,
Defendants.

ORDER

This cause is before the Court on limited remand from the United States Court of Appeals for the Eleventh Circuit.[1] In an Order dated April 7, 1989, the Hon. William J. Castagna denied the defendants' motions

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The Eleventh Circuit's Order of April 10, 1990 directed the District Court to resolve this matter on or before May 9, 1990. In order to give the parties adequate time to prepare for an evidentiary hearing before the United States Magistrate and to then file any objections to the Magistrate's report and recommendation, the deadline imposed by the Court of Appeals could not be met.

for Rule 11 sanctions and to tax costs. The case subsequently was remanded to the District Court for the purpose of clarifying its reasons for refusing to impose Rule 11 sanctions against the plaintiff. Following remand, Judge Castagna entered an Order of recusal and vacated the Order denying sanctions and costs. The case then came before the undersigned, who (being involved in an on-going, protracted criminal trial) referred the matter to the United States Magistrate for her report and recommendation as to appropriate disposition of the case. The undersigned further directed the Magistrate to give fresh consideration to the issues to determine whether sanctions and/or costs are appropriate and, if so, in what amount.

The Magistrate conducted an evidentiary hearing on the matter and has filed her report recommending the imposition of sanctions against counsel for plaintiff in the amount of $4,420.00.

Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of the entire file, including the objections of the parties to the report and recommendation, the Magistrate's report is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That sanctions be imposed against J. Miles Buchman, counsel for plaintiff, in the amount of $4,420.00, and the Clerk is instructed to enter judgment accordingly.

2. That the Clerk unseal the Magistrate's report and recommendation and the objections to that report filed by the parties.

3. That the Clerk forward a copy of this Order, the Magistrate's Report and Recommendation, the transcript of hearing before the Magistrate, and the objections of the parties to the Clerk of the Court of Appeals.

DONE AND ORDERED in Chambers in Tampa, Florida this 22nd day of May, 1990.

/s/ Wm. Terrell Hodges

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